EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MS MELANIE FOWLER	**V**	**BETSI CADWALADR UNIVERSITY LOCAL HEALTH BOARD**

HELD REMOTELY BY CVP ON: 12, 13 & 14 FEBRUARY 2024

BEFORE: EMPLOYMENT JUDGE S POVEY
MS R HARTWELL
MR P COLLIER

REPRESENTATION:
FOR THE CLAIMANT: IN PERSON (SUPPORTED BY MR HANLON)
FOR THE RESPONDENT: MR WALTERS (COUNSEL)

JUDGMENT having been sent to the parties on 15 February 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The decisions of the Tribunal are unanimous and although it is the Employment Judge providing the decision and reasons to the parties, they are the decisions of all of us and have been contributed to by all members of Tribunal.

Background

2. This is a claim by Melanie Fowler ('the Claimant') against her former employer, Betsi Cadwaladr University Local Health Board ('the Respondent'). The Claimant began ACAS Early Conciliation on 9 March 2023 and it ended on 14 March 2023. The claim was presented to the Tribunal in form ET1 on 11 April 2023.

3. The Claimant brings complaints of unfair dismissal, disability discrimination and unpaid holiday pay. All of those complaints are resisted by the Respondent.

4. At a Case Management Hearing on 5 September 2023 before Employment Judge Sharp, a List of Issues was agreed. Since then, the Respondent has confirmed that it is not in issue that the Claimant was disabled by way of stress and anxiety at the relevant time (as defined by section 6 of the Equality Act 2010) or that the Respondent had knowledge of the Claimant's disability. In addition, the Claimant confirmed that she was not pursuing a complaint of failure to make reasonable adjustments.

5. As such, the complaints being pursued and which the Tribunal had to determine were:

    5.1. Unfair dismissal

    5.2. Discrimination arising from disability

    5.3. Unpaid holiday pay

6. At the outset of hearing, we checked that these Issues remained the issues we were required to determine (which they were). From that, it was clear that the claim focuses on events between March 2022 and January 2023.

7. We heard oral evidence from the Claimant and for the Respondent, we heard from the following employees:

    7.1. Glenys Mutter (Senior Sister and the Claimant's line manager at relevant time)

    7.2. Denise Williams (People Business Partner)

8. Since the events in this case took place, Ms Mutter had been diagnosed with transient global amnesia, which severely affected her memory. As such, her evidence was to a great degree based upon the documentary evidence and what limited recollection she had of events.

9. Tracey Cottage (People Officer at the relevant time) also provided a witness statement but did not attend the hearing. As such, her evidence could not be tested and we attached little weight to any aspect of her written evidence which was disputed or unsupported by other evidence.

10. Each witness we heard from adopted their written statement. We also also had sight of paginated bundle ('the Bundle') and received oral submissions from Mr Walters for the Respondent and written submissions from the Claimant.

11. The Claimant was a litigant in person and continued to have issues with her mental health. The Tribunal had regard to the Claimant's health

conditions and their effects in how we managed the hearing. In addition, we explained the process and procedures to the Claimant, checked her understanding, encouraged her to ask questions and gave her guidance throughout. We were satisfied that the Claimant, with the assistance of her brother, Mr Hanlon, was able to fully engage in the process and present her claim to the best of her abilities.

12. We were grateful to the Claimant and Mr Walters for the assistance they provided and the work they had undoubtedly undertaken both before and during the hearing. We were grateful to all the witnesses including the Claimant, who attended and answered the questions asked of them to the best of their recollections. We were also grateful to Mr Hanlon who supported and assisted the Claimant throughout the hearing.

Findings of Fact

13. To a great extent, the relevant facts in this case were not in dispute.

14. The Claimant was employed by the Respondent as a Band 5 Nurse from 14 January 2018 until her dismissal which took effect on 24 January 2023. She was initially employed for 24 hours per week but reduced her hours to 16 per week with effect from 3 April 2022.

15. The Claimant commenced sick leave on 21 March 2022. She had a telephone consultation with Occupational Health ('OH') on 28 April 2022 who reported that the Claimant was "*overwhelmed by the needs of her family at present and is finding it very difficult to balance this with work. She has accessed counselling support but I do not anticipate a return to work prior to me reviewing her"* (at [121] of the Bundle).

16. In accordance with the NHS All-Wales Managing Attendance at Work Policy (which was used by the Respondent and was in evidence), the Claimant was invited to a long term sickness review meeting on 31 May 2022. The Claimant attended the meeting unaccompanied (although she had been afforded the right to be accompanied). Ms Mutter and Ms Cottage attended for the Respondent. By a letter also dated 31 May 2022, Ms Mutter confirmed what had been discussed at that meeting (at [129] – [130] of the Bundle), which included, amongst other things, that the Claimant had reduced her hours to 16 from 3 April 2022. A further long term sickness absence review meeting was arranged for 14 June 2022.

17. At the same time, the Claimant's GP issued a fit note dated 31 May 2022, confirming that the Claimant was not fit for work until at least 3 July 202 because of a stress related problem and did not suggest that any adjustments would benefit the Claimant's return to work at that stage. (at [131] of the Bundle).

18. The next absence review meeting was on 14 June 2022. The Claimant attended with her union representative, James May. A summary of the meeting was provided by Ms Mutter in her letter of 14 June 2022 (at [133] – [134] of the Bundle). Ms Mutter attended the meeting as did Ms

Williams, who attended in place of Ms Cottage (who was unable to attend). The purpose of the meeting was for Ms Mutter "*to get a clear understanding of your condition, in order to better offer you support and discuss any potential adjustments we could make to better facilitate your return to work"* (per her letter at [133]). The fit note of 31 May 2022 was noted as was the reason for the Claimant's absence being stress related to issues at home. There was also a discussion about adaptions that could be implemented to enable the Claimant to return to work and a further meeting was arranged for 11 July 2022.

19. On 15 June 2022, the Claimant had a further consultation with OH (at [136] of the Bundle), which reported that no adjustments could be identified that would enable a return to work. The OH also reported the following (at [137]):

> I have not arranged an Occupational Health review on this occasion as I do not believe that it would add value. I suggest that management remain in contact and re-refer if advice is required when a return to work is planned.

20. By a letter dated 11 July 2022, Ms Mutter again summarised what had been discussed at the long term sickness reviewing meeting with the Claimant on the same date, which was also attended by Ms Cottage and Mr May (at [143] – [144] of the Bundle). This included a discussion about flexible working, therapeutic days and, if successful, a phased return to work. The Claimant also reported that she had a forthcoming appointment with the mental health charity, MIND and continued to be signed off by her GP as unfit for work with no adjustments proposed (per the fit note at [142]).

21. A further absence review meeting was arranged for 15 September 2022 (per the letter of 24 August 2022 at [153 of the Bundle]). However, that meeting was rearranged at the request of the Claimant (who was suffering from sinusitis and tonsilitis) to 22 September 2022 (at [156] – [157]) and was rearranged again to 26 September 2022 to enable the Claimant's union representative to also attend (at [159]). The Claimant continued to be signed off as unfit for work by her GP throughout this period with no adjustments identified that would enable her to return to work.

22. At the meeting on 26 September 2022, there was an agreement to arrange some therapeutic days, where the Claimant would come into work to catch up with any outstanding training and meet with colleagues, as a first step towards a phased return to work (per the letter of 26 September 2022 at [164] of the Bundle).

23. By this time, the Claimant had been absent from work for six months.

24. Following the meeting on 26 September 2022, Ms Mutter asked the Claimant to provide her with dates she would be able to "*come in to work, catch up with some mandatory training and meet up with colleagues"* (per her email 26 September 2022 at [165] of the Bundle). In response, the Claimant said that she was *"happy to initially try one session to see how*

things go but can't commit to a number of them due to anxiety of even doing one session" (at [182] – [183]).

25. A further absence review meeting was arranged for 6 October 2022 (at [179] of the Bundle). This was rearranged to 17 October 2022 at the Claimant's request and a further OH referral arranged for 11 October 2022 (at [180]). In addition, a therapeutic day was arranged for 10 October 2022 (at [184] – [185]), which the Claimant attended with her daughter (for support) (per Paragraph 38 of the Claimant's witness statement). On the day, the Claimant had been unable to find anyone in management but did spend some time catching up with colleagues (it was not in dispute that Ms Mutter was on leave at the time).

26. The next review meeting went ahead on 17 October 2022, attended by the Claimant, Ms Mutter, Ms Cottage and Mr May. Ms Mutter's letter with a summary of what was discussed was, in our judgment, mistakenly dated 17 October 2022 (at [195] – [197] of the Bundle). It is clear from reading the letter that it was actually written sometime after 20 October 2022.

27. The Claimant had been unable to attend any further proposed therapeutic days in October 2022 because she was too unwell. She had contacted MIND, from whom she was receiving some support. The Claimant met with OH on 19 October 2022, whose report included the following (at [199] – [200] of the Bundle):

    27.1. Under "Prognosis":

    > [The Claimant] expressed that she would like to return to work soon however worries about her performance if she returns too early. I understand therapeutic days have been suggested in the past but she does not feel she can manage these.

    27.2. Under "Additional advice from Occupational Health":

    > Based on today's consultation, [the Claimant] will likely return to work when situation at home improves and she feels better. This will likely take some time. I am unable to predict a possible return to work date. You may wish to manage this case in line with [the Respondent's] policy for long term sickness.

28. Again, OH did not suggest that there were any adjustments, reasonable or otherwise, which could, at that time, facilitate the Claimant's return to work.

29. By a letter dated 24 October 2022, Ms Mutter invited the Claimant to a Final Review Meeting scheduled for 31 October 2022 (at [201] – [202] of the Bundle). The invitation explained that, as the Claimant's symptoms had not improved and she could not envisage returning to work in any capacity, a situation supported by OH, then in line with the absence management policy, if she were unable to identify a return to work date in the foreseeable future, her employment would be terminated on grounds of capability. It also informed the Claimant of her right to be accompanied

to the meeting and enclosed the evidence relied upon by the Respondent (namely the long term review outcome letters and the OH reports).

30. On 25 October 2022, the Claimant emailed Ms Mutter, reporting that she was feeling a little better and would like to try a phased return to work (at [207] – [208] of the Bundle). This was agreed to by Ms Mutter and the Final Review Meeting scheduled for 31 October 2022 was cancelled.

31. The Claimant began a planned four week phased return to work on 1 November 2022. Unfortunately, she was only able to complete two weeks due to "*feeling physically and mentally fatigued"* (per the Claimant's email of 14 November 2022 at [211] of the Bundle).

32. As well as being unable to continue with the phased return to work, the Claimant also indicated verbally to Ms Mutter that she wished to resign her employment (at the very least, it was interpreted by Ms Mutter as a resignation). Ms Mutter was concerned that the Claimant may be acting in the heat of the moment and so sent a letter dated 15 November 2022 to the Claimant, affording her until 12 December 2022 to consider her decision and confirm her intentions (at [214] of the Bundle).

33. The Claimant continued to be signed off by her GP as unfit for work, with no adjustments that could enable her to return to work. On 7 December 2022, the Claimant email Ms Mutter, which included the following (at [233] of the Bundle):

> Please could we arrange follow up and plan following failed phases [sic] return.
>
> I am still ill and seeing counsellor.
>
> I would like to see what next steps are and what can be offered and what is for best all round. At present I am not resigning but still in same situation with mental and physical fatigue.

34. On 13 December 2022, Ms Mutter invited the Claimant to a rescheduled Final Review Meeting on 21 December 2022. As before, the Claimant was informed that if a return to work date could not be identified in the foreseeable future, her employment would be terminated. She was again advised that she could be accompanied by her union representative (at [235] – [236] of the Bundle).

35. On 19 December 2022, the Claimant emailed Ms Mutter and asked if the Final Review Meeting could be postponed and rescheduled to a date between Christmas and New Year, because she was feeling very emotional and overwhelmed (at [240] of the Bundle). Ms Mutter responded the following day as follows (at [240]):

> Really sorry but there are people off between Christmas and New year and would not be able to accommodate.
>
> We really do need to catch up with you this week please.

> If you need me to come and meet you outside and support you into my office this will be fine, let me know.

36. After receiving that email, the Claimant emailed Mr May asking if he would be able to attend the meeting on 21 December 2022 with her. She also asked to meet with Mr May to "*formulate a plan as to what is best deal for me*" (at [242] of the Bundle).

37. There was evidence of telephone conversations between the Claimant and Mr May on the morning of 21 December 2022 (per the emails at [242] of the Bundle). This was consistent with the evidence of Ms Williams that she was contacted on the morning of 21 December 2022 by Mr May, who informed her of the following (per Paragraph 35 of Ms Williams witness statement):

    37.1. That the Claimant was not well enough to attend the Final Review Meeting, scheduled to begin at 11am that day;

    37.2. That the Claimant was content for the meeting to proceed in her absence; and

    37.3. That the Claimant had no intention of returning to work, wanted her employment terminated and wanted to receive her notice pay.

38. Ms Williams asked Mr May to obtain written confirmation from the Claimant that she was content for the meeting to proceed in her absence, which was provided by an email received by him from the Claimant and timed at 10.20am (at [243] of the Bundle).

39. The Final Review Meeting took place on 21 December 2022 without the Claimant. By a letter dated 21 December 2022, Ms Mutter informed the Claimant of what happened at the meeting and the outcome, as follows (at [247] – [248] of the Bundle):

> …
> At the meeting on the 21st December 2022, we went through your file, reviewed your sickness absence and I reflect on the fact that you initially went off sick on the 21st March 2022 and remained off until the 29th October 2022 and during this time a number of sickness reviews were undertaken. You returned on the 1st November 2022 on a 4 week phased return program, however you only managed to work 4 shifts over a 2 week period and then went back off sick. You have been off with family related stress and issues.
>
> You initially advised me that you could not handle it anymore and you verbally resigned. I sent you a cooling off letter on 15th November giving you 4 weeks to consider your decision, as this could have been done in the heat of the moment. You contacted me on the 7th December 2022 saying "At present I am not resigning but still in the same position with mental and physical fatigue."

> Following the review and your email, a return date could not be identified and it became a final review meeting. …
>
> Throughout the period of your illness, you have attended your GP and a number of other medical and hospital appointments. You have also had telephone consultations and appointments with Occupational Health.
>
> In our judgment, that was an accurate summary of what had occurred during C's sickness absence. The letter went on:
>
> Given the information that you have provided on your medical condition, and also the opinion of your GP, you are unable to return to work for the foreseeable future either to your current job role with reasonable adjustments or to an alternative job role, I was left with no alternative other than to terminate your contract on the grounds of incapacity to attend work due to your health reasons.
>
> I am writing to inform you that you will receive 5 weeks payment in Lieu notice. You have accrued 79.12 hours annual leave entitlement, therefore your sickness episode will be ended on the 21st December 2022, you will then utilize your accrued annual leave up until the 24th January 2023, for which you will receive full pay. I confirm that your last day of employment with the Organization will be the 24th January 2023.
> …

40. The letter went on to afford the Claimant a right of appeal against the decision to dismiss her, which she exercised by email on 3 January 2023 (at [255] – [256] of the Bundle) .On 21 February 2023, the Respondent wrote to the Claimant acknowledging her appeal request and asking for the reasons she was appealing. That request was chased by the Respondent on 27 February 2022, with a request for a response by 2 March 2023 (at [282]).

41. The Claimant was continuing to be advised and supported by her union and on 27 February 2023 responded to the Respondent with her reasons for appealing the decision to dismiss (at [284] of the Bundle). In response, Ms Williams drafted a statement of case on behalf of the Respondent, setting out the support provided and offered to the Claimant during her sick leave, its reasons for dismissing the Claimant and its response to her appeal (at [285] – [290]).

42. The appeal hearing was scheduled for 15 March 2023. However, by an email dated 14 March 2023, the Claimant informed the Respondent that she had decided to withdraw her appeal (at [297] – [298] of the Bundle).

43. As recorded above, the letter of 21 December 2022 terminating the Claimant's employment informed her that she would receive five weeks' pay in lieu of notice and her outstanding holiday entitlement of 79.12 hours would be paid to her as wages over the following weeks, until it was exhausted on 24 January 2023.

44. On 23 December 2022, the Claimant emailed Ms Mutter and asked that her outstanding holiday entitlement and notice pay be combined and paid

to her as a single payment (at [253] of the Bundle). Ms Mutter took advice and was informed that, as annual leave was pensionable, it had to be utilised prior to the termination date (at [253]). As such, the Claimant was paid her normal wages until 24 January 2023, albeit those payments were in fact her accrued holiday entitlement. Ms Mutter passed that information on to the Claimant in an email dated 4 January 2023 (at [258]).

45. What the Respondent did not do, for which Mr Walters on its behalf apologised to the Claimant at the outset of hearing, was make the payment in lieu of notice. We were provided with a letter dated 9 February 2024 from Ms Williams to the Claimant, confirming that payroll had now been instructed to pay the Claimant a sum equivalent to five weeks' pay in lieu of her entitlement to notice. An advance payment of £900 was paid immediately with the balance to be paid towards the end of February 2024.

46. Finally, the Claimant revealed in her oral evidence that in the intervening 12 months since the termination of her employment with the Respondent, she has unfortunately remained, and continues to remain, too unwell to work.

Analysis & Conclusions

47. We considered the substantive complaints in turn. We have structured our analysis and decision-making on the List of Issues (at [51] – [55] of the Bundle, so far as relevant to the agreed issues on liability).

The Applicable Law

48. Mr Walters provided a written and oral summary of the relevant principles, primarily for the benefit of Claimant. The applicable legal provisions were uncontroversial and were, in our view, accurately summarised by Mr Walters. As such, we did not set them out in detail in our oral reasons and include Mr Walters' written summary at Appendix 1 to these written reasons.

The Issues

49. The Claimant claimed (and the Respondent denied):

    49.1. Ordinary unfair dismissal

    49.2. Discrimination arising from disability, the detriment being her dismissal

    49.3. Unpaid holiday pay

Unfair Dismissal

The Reason for Dismissal

50. The Respondent said that it dismissed the Claimant by reason of capability, arising from her ill-health, which, by virtue of the Employment Rights Act 1996, is a potentially fair reason for dismissal.

51. The Tribunal found that the reason for dismissal was capability. There was consistent evidence of the Respondent seeking to manage the Claimant's absences by reference to the long-term ill health policy, which concluded with a Final Review Meeting in December 2022.

52. In the invitation letter of 13 December 2022 to that Final Review Meeting, the Claimant was warned that a potential outcome of the meeting was dismissal for capability. In the letter of 21 December 2022, which confirmed that the Claimant's employment had been terminated, Ms Mutter informed the Claimant as follows (as recorded earlier in these reasons):

> I was left with no alternative other than to terminate your contract on the grounds of incapacity to attend work due to your health reasons.

53. Indeed, the Claimant did not then, and does not now, suggest that she was anything other than very ill at that time. Her GP confirmed that she was unfit for work throughout the relevant period and no adjustments would facilitate her return to work. OH was of the view that the Claimant was unfit for work and was unable to predict when she would be fit again. And the Claimant's own view, as expressed during the various absence review meetings, was that she remained unfit for work and was unable to say when she would be fit again.

54. As such, the Tribunal had no hesitation in finding that the reason for the Claimant's dismissal was capability arising from her ill-health absence.

55. As capability is a potentially fair reason for dismissal, we went on to consider whether the decision to dismiss the Claimant because of capability was substantively and procedurally fair.

Substantive Fairness

56. When deciding whether the decision to dismiss was substantively fair, we must consider whether the Respondent could have been expected to wait any longer for the Claimant to return

57. Secondly, a fair process was essential. This required, in particular:

    57.1. Consultation with the employee;

    57.2. A thorough medical investigation (to establish the nature of the illness or injury and its prognosis), and

    57.3. Consideration of any other options short of dismissal.

58. Finally we reminded ourselves that the test was whether dismissal was within a range of reasonable responses available to the Respondent, having regard to the facts of the case. It was not for the Tribunal to substitute its own view but to ask whether a reasonable employer, faced with the circumstances which faced the Respondent, would have been entitled to dismiss the Claimant.

59. Upon the Claimant starting her ill-health absence in March 2022, the Respondent undertook regular review meetings with her, referred her to OH, had regard to the reports produced by OH and considered various options which might facilitate the Claimant's return to work (including therapeutic days and a phased return). For her part, the Claimant engaged in the review meetings, continued to liaise with OH and her own GP (who was able to provide regular fit notes) and eventually sought assistance from MIND.

60. As recorded earlier, the Claimant also attempted a phased return to work in November 2022 but without success.

61. In our judgment, the Respondent consulted with the Claimant throughout and informed itself of the Claimant's condition. It also considered options short of dismissal. However, the Respondent was receiving a consistent and unambiguous message throughout the entirety of this period that the Claimant was unfit for work, there were no adjustments, reasonable or otherwise, which could facilitate her return to work and there was no indication of when she was likely to be fit to return to work. That was the clear view of the Claimant, of her GP and of OH.

62. Faced with that information, which had been obtained as a result of thorough investigation and enquiry, the Tribunal were of the view that the Respondent was entitled, by December 2022, to not wait any longer. In addition, though of less importance to the issue of substantive fairness, the Respondent was being informed by the Claimant's union representative on 21 December 2022 (and prior to making the decision to dismiss) that the Claimant had no intention of returning to work and wanted her employment terminated.

63. Indeed, although not relevant to the issues we had to decide (since we were focussing on what the Respondent knew at the time of the decision to dismiss), those views of the Claimant and the various medical practitioners had been, unfortunately, accurate, with the Claimant continuing to be too unwell to return to work in the intervening 12 months since leaving the Respondent's employment.

64. For those reasons, the decision to dismiss the Claimant was within the range of reasonable responses available to Respondent.

Procedural Fairness

65. The Respondent followed its policy in managing the Claimant's absence. It held regularly review meetings with her, obtained the opinions and

recommendations of OH and explored measures and proposals to support the Claimant back into work.

66. The invitation to the Final Review Meeting of 21 December 2022 explained why the Claimant was being invited, made her aware that dismissal might be an outcome and told her that she could be accompanied. In addition, the Respondent had already provided the Claimant with the evidence it relied upon, when inviting her to the previous (and postponed) Final Review Meeting in October 2022.

67. The Respondent was unable to accommodate the Claimant's request to move the Final Review Meeting of 21 December 2022 to the following week and explained why (a shortage of appropriate staff). There was evidence that the Claimant was arranging to attend the meeting with her union representative (per the emails at [242] of the Bundle) but on the morning of 21 December 2022, the Claimant did not feel well enough to attend.

68. Even if the meeting had been moved, the Claimant, to her credit, was candid in her oral evidence (and in response to a question from the Employment Judge) that she did not know if she would have been able to attend any rearranged meeting. In addition, the Respondent was informed by the Claimant's union representative that the Claimant was happy for the meeting to proceed in her absence, which the Claimant also confirmed in writing.

69. Given the steps taken by the Respondent to manage the Claimant's absence up to 21 December 2022 and the information being provided to it by the Claimant and her union representative (consenting to the meeting proceeding in the Claimant's absence, the Claimant's intention not to return to work and her wish that her employment be terminated), the decision not to accede to the Claimant's request for the meeting on 21 December 2022 to be moved did not render the process procedurally unfair.

70. After the 21 December 2022 meeting, the Claimant was given a decision in writing with reasons and given a right of appeal, which she initially exercised but later, and of her own volition, withdrew.

71. As such, the decision making process was procedurally fair.

72. For those reasons, the Claimant was dismissed by reason of capability and the decision to dismiss her was fair. As such, the claim for unfair dismissal was not made out and was dismissed.

<u>Discrimination arising from disability</u>

73. The Claimant claimed that she was treated unfavourably by the Respondent in dismissing her, that the something arising in consequence of her disability was her sickness absence during 2022 and that the Respondent dismissed her because of that sickness absence.

74. All of those factors are either not in dispute or consistent with our findings, above.

75. The Claimant was disabled by reason of stress and anxiety. The GP fit notes and OH reports recorded the Claimant as unfit for work by reason of stress and anxiety. The Claimant was dismissed because of her sickness absence during 2022.

76. However, and as entitled by law, the Respondent relied upon the justification defence, namely that the Claimant's dismissal was a proportionate means of achieving a legitimate aim.

77. The Respondent said that the legitimate aim it was pursuing was to ensure that the health services it provided to the public in North Wales were operationally resilient.

78. We did not understand that legitimate aim to be in dispute but in any event, it was clearly a legitimate aim for a local health board to pursue.

79. There will always be a balance to be struck between supporting those who are unwell in employment and being able to deliver services with sufficient staff. The Respondent could not dismiss the Claimant straight away but also could not be expected to wait indefinitely for her to get better.

80. In this case, the Respondent had waited nine months with no indication of when or if the Claimant would be able to return to work. The Respondent was being told that there were no adjustments that could be made that would facilitate the Claimant's return to work. The Respondent also had a practical indication of the Claimant's inability to return to work because of her health, when she tried to undertake the four week phased return in November 202. The Claimant's reaction to the phased return (only managing two weeks before, once more, being certified unfit for work) was wholly consistent with the medical opinions being provided to the Respondent at the time.

81. There was consistent and compelling evidence that the Claimant was not well enough to work, with no indication of when she would be well again. The medical opinions and the Claimant's own belief appeared to have been well-founded, given that the Claimant remained too ill to work (and continues to remain too ill to work) in the 12 months following the termination of her employment with the Respondent.

82. In reality, there was no prospect that the Claimant would return to work within a reasonable period of time, no adjustments being presented by the Claimant, her GP or OH that would enable her to return to work sooner and the Claimant had been absent for a period of nine months, save for the attempted phased return to work in November 2022, which had failed.

83. There was, in our judgment and when faced with those circumstances, nothing, whether less discriminatory or otherwise, that the Respondent could have done to reasonably achieve its legitimate aims in respect of the Claimant or her employment..

84. We found that the decision to terminate the Claimant's employment on 21 December 2022 was proportionate means of achieving that legitimate aim, given all the information that was being received by the Respondent from the Claimant and the medical experts about the prospects of her returning to work. For nine months, that Claimant had been too ill to work and there was nothing to indicate that that would change any time soon. In simple terms, there was nothing else that the Respondent could have reasonably done in the face of the information it was receiving from the Claimant, from her GP and from OH.

85. It follows that the decision to terminate the Claimant's employment was lawful and the unfavourable treatment (of dismissing her because of her ill-health absence) was justified by the Respondent. As such, the complaint of disability discrimination was not made out and was dismissed.

Holiday Pay

86. The Respondent said that when it terminated her employment, it paid the Claimant the holiday pay that had accrued up until the end of January 2023, to ensure that those payments were treated as wages and triggered contributions by the Respondent to her pension. But in error, the Respondent failed to pay the Claimant in lieu of notice, which it should have done and which it was in process of now doing.

87. In the dismissal letter of 21 December 2022, the Respondent set out what holiday pay it believed the Claimant was entitled (namely, equivalent to 79.12 hours) and that it would be utilised up to 24 January 2023.

88. It was not in dispute that those sums were paid to the Claimant. In effect, therefore, the Claimant needed to show that she was owed more than 79.12 hours holiday pay.

89. At the time of receiving the letter of 21 December 2022, with its calculation of holiday pay entitlement, the Claimant asked for it to be paid as a lump sum (per her email of 23 December 2022). What she did not do at that time was claimed to be owed more than 79.12 hours of accrued holiday. She did raise a query about historic holiday entitlement from 2021/22 (at [257] of the Bundle) to which Ms Mutter replied on 7 February 2023 (at [265]). Thereafter nothing further was raised about why or by how much the 79.12 figure in the letter of 21 December 2022 was incorrect.

90. Having said that, there was some conflicting evidence, which was drawn out by Mr Hanlon in his questioning of the Respondent's witnesses. At [145] of the Bundle was an email dated 2 August 2022 that recorded the

Claimant's leave as 158.70 hours (which was double 79.12). At [315], there was a record of gross annual leave as 128.5 hours and a net figure (which [305] recorded as net of bank holidays and statutory days) of 104.5 hours.

91. In her Schedule of Loss, the Claimant claimed that she had accrued 177.6 hours by 24 January 2023 (at [43] of the Bundle). In a separate document entitled Annual Leave Calculation (at [59]), the Claimant claimed that she was owed 20.75 hours from 2021/22 (presumedly on the basis that, on the Claimant's case, she was permitted to carry unused leave entitlement over into the next leave year) and a further 110.1 hours for 2022/23, pro-rated to 24 January 2023 plus nine bank holiday days, giving a total for 2022/23 of 153.30 hours and an overall total for 2021 – 23 of 174.05 hours.

92. We were therefore left with five different figures for accrued holiday entitlement.

93. In our judgment, if the Claimant thought, when dismissed, that she was entitled to 128.5 hours or 158.7 hours or 174.05 hours or even 177.6 hours, we would have expected her to have raised that with the Respondent but she did not. And, as noted above, this was not because the Claimant was unable or unwilling to engage with the Respondent in the aftermath of receiving the letter of 21 December 2022. She asked for her holiday pay to be paid in a lump sum and also pursued an appeal against her dismissal.

94. For that reason, the Tribunal concluded that, on balance, the Claimant had accrued 79.12 hours. That was then paid to her over the weeks between 21 December 2022 and 24 January 2023. In error, the Respondent did not also pay the Claimant in lieu of notice, as proposed but that is now in in the process of being rectified.

95. The only complaint before the Tribunal in this regard was one of unpaid holiday pay. We found that all sums due to the Claimant were paid in full by 24 January 2024. We understand where the confusion arose from and welcomed the Respondent‘s apology that it had erred in not also paying the Claimant a lump sum equivalent of five weeks wages, in lieu of notice

96. For those reasons, the holiday pay claim was not made out and was dismissed.

Conclusion

97. The manner and circumstances of how the Claimant's employment ended with the Respondent was not what either of the parties would have wished for. The Claimant was unwell and continues to struggle with her health. The Tribunal had every sympathy for her and for the challenges she faces in her life. But not only did the evidence show that the Respondent acted wholly lawfully in dismissing her and did not discriminate against her as claimed, it also showed an employer that was doing everything it could to

maintain the Claimant's employment. The fact that it was simply not possible to do so was regrettable to all but was not because of any unlawful, discriminatory or untoward actions or behaviour on the part of the Respondent or its staff.

EMPLOYMENT JUDGE S POVEY
Dated: 19 February 2024

Order posted to the parties on 21 February 2024

For Secretary of the Tribunals Mr N Roche

APPENDIX 1

IN THE WALES EMPLOYMENT TRIBUNAL CASE NO: 1600750.2023

BETWEEN

MELANIE FOWLER

Claimant

And

BETSI CADWALADR UNIVERSITY LOCAL HEALTH BOARD

Respondent

SUBMISSIONS ON THE RELEVANT LEGAL PRINCIPLES

1. These submissions are made in writing and to assist the tribunal and the Claimant they have been shared with her before the close of evidence. Submissions on the facts and outcomes will be made orally at the conclusion of the evidence.

UNFAIR DISMISSAL CONTRARY TO ss. 94/98 ERA 1996

2. In determining whether or not a dismissal by an employer is fair, there are two stages. First, the employer must establish the principal reason for the dismissal and show that it falls within the category of reasons which the law specifies as being potentially valid reasons under section 98 (1) and (2) ERA 1996. Second, it is necessary for the tribunal to be satisfied that in the circumstances the employer acted reasonably in treating the reason as a sufficient ground for dismissing the employee.

3. In applying the ERA 1996 s 98(4) test of fairness in the light of equity and the substantial merits, the correct approach for the tribunal is to

consider whether dismissal was an option that a reasonable employer could have adopted in the circumstances, not simply to decide whether the tribunal would have dismissed. The tribunal will ask itself was dismissal a reasonable decision, not the right one. Another way is that the general principle is that what is being adjudicated on is the fairness of the employer's action, not the injustice to the employee.

ILL HEALTH DISMISSALS

4. As the Editors of Harvey's make plain, "*The starting point for analysing the duty of the tribunal in deciding whether or not an ill health capability dismissal is fair is the EAT decision in* ***Spencer v Paragon Wallpapers Ltd [1977] ICR 301****. In that case Phillips J emphasised the importance of scrutinising all the relevant factors.*

'Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?'' And he added that the relevant circumstances include 'the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do'."

5. Also in **Taylor v OCS Group Ltd [2006] IRLR 613** the Court of Appeal stressed that tribunals should not consider procedural fairness separately from other issues arising. It is right that the tribunal should consider the procedural issues together with the reason for the dismissal. Inevitably, the two matters impact upon each other and it is the tribunal's obligation is to consider whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss.

DISMISSAL PROCEDURES

6. In **Polkey v AE Dayton Services Ltd [1987] ICR 142**, Lord Bridge strongly emphasised the importance of procedural safeguards in the following passage:

''Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal one of the reasons specifically recognised as valid by [ERA 1996 s 98(2)]. These, put shortly, are: (a) that the employee could not do his job properly; (b) that he had been guilty of misconduct; (c) that he was redundant. But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action. Thus, in the case of incapacity, the employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job; in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation; in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation. If an employer has failed to take the appropriate procedural steps in any particular case, the one question the [employment] tribunal is not permitted to ask in applying the test of reasonableness posed by [s 98(4)] is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of [s 98(4)] this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional

circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under [s 98(4)] may be satisfied'.'

7. It is important usually for there to be consultation with employee about their medical position and when they are likely to be able to return to work. Sometimes a tribunal may find that the medical position has been adequately established following consultation with the employee himself; in others the employer ought to consult doctors about the state of the employee's health see **Patterson v Messrs Bracketts [1977] IRLR 137**.

8. **In O'Brien v Bolton St Catherine's Academy [2017] IRLR 547** at **[para 53]** Underhill LJ (with whom Etherton MR agreed) indicated the following which is helpful to an employer where the claimant contends for disability-related discrimination under s.15 EqA 2010 alongside the unfair dismissal claim:

"... *the basic point being made by the tribunal was that its finding that the dismissal of the appellant was disproportionate for the purpose of s.15 meant also that it was not reasonable for the purpose of s.98(4). In the circumstances of this case I regard that as entirely legitimate. I accept that the language in which the two tests is expressed is different and that in the public law context a 'reasonableness review' may be significantly less stringent than a proportionality assessment (though the nature and extent of the difference remains much debated). But it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law. Fortunately I see no reason why that should be so. On*

*the one hand, it is well established that in an appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the tribunal is responsible for striking the ultimate balance; and I see good reason for such an approach in the case of the employment relationship. On the other, I repeat – what is sometimes insufficiently appreciated – that the need to recognise that there may sometimes be circumstances where both dismissal and 'non-dismissal' are reasonable responses does not reduce the task of the tribunal under s.98(4) to one of 'quasi-*Wednesbury*' review: see the cases referred to in paragraph 11 above[2]. Thus in this context I very much doubt whether the two tests should lead to different results.*[3]

9. It is an exceptional case in which the failure to follow any dismissal procedure will be considered to be a reasonable response. However, as is clear from the case of **Gallacher v Abellio Scotrail Limited UKEATS /0027/19/SS** the futility of a process or indeed a step within that process is a very relevant consideration. The EAT observed that *"although any contention by an employer that following a procedure would be futile would be approached with caution, this was one of those rare cases where it was open to the Tribunal to conclude that dismissal without any procedure was within the band of reasonable responses"*

UNFAVOURABLE TREATMENT - S.15 EqA 2010

10. Section 15 of the EqA 2010 states as follows:

> *" (1) A person (A) discriminates against a disabled person (B) if—*
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."*

(2) Subsection (1) does not apply 'if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability

UNFAVOURABLE TREATMENT/CAUSATION

11. It is not disputed that dismissal was unfavourable treatment and that the dismissal was for something arising in consequence of the Claimant's disability namely the sickness absence along with the likelihood that she would not return for the foreseeable future.

THE STATUTORY DEFENCE

12. The classic definition of the statutory defence to a s.15 claim requires consideration of whether the employer has a legitimate aim which it seeks to achieve by proportionate means. Whether an aim is 'legitimate' is a question of fact for the tribunal see **Ladele v London Borough of Islington [2009] EWCA Civ 1357.**

13. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the undertaking. It would be quite wrong to consider only the impact on the individual see **City of Oxford Bus Services Ltd v Harvey UKEAT/0171/18.**

14. In **City of York Council v Grosset UKEAT/0015/16** it was held that the test of justification is an objective one to be applied by the tribunal and it can make its own determination and is not bound by the assertions of the employer.

THE POLKEY PRINCIPLE

15. The so-called 'Polkey principle' as established in the case of ***Polkey v A E Dayton Services Ltd [1988] ICR 142*** is relevant to considerations of

compensation in a dismissal case whether under s. 98 ERA 1996 or s.15 EqA 2010 . The overriding duty imposed on a tribunal is to award compensation which is just and equitable in all the circumstances of the case. Consequently, the tribunal may award no compensation if it would be unjust or inequitable for the employee to receive it.

16. The Polkey principle establishes that if the employee may have been dismissed properly[1] if a fair procedure had been carried out, the tribunal should normally make a percentage assessment of the likelihood and apply that when assessing the compensation see **Dunlop Ltd v Farrell [1993] ICR 885**. However, there may be cases where it is appropriate for the tribunal to determine the date by which it considers the employee would have been dismissed in any event and to limit the compensation to the period up to that date see **O'Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615**.

13 February 2024

Jonathan Walters
Counsel for the Respondent

[1] By the particular employer.